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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1370

GOLAY & CO., INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Golay & Co., Inc. (hereinafter referred to as the "Company"), prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit (hereinafter referred to as the "Seventh Circuit") enforcing an order of the National Labor Relations Board (hereinafter referred to as the "Board") against Golay & Co., Inc.

CITATIONS TO OPINIONS BELOW.

The opinion of the Seventh Circuit (printed in Appendix A hereto, *infra* pp. 1a to 7a) is reported at 371 F.2d 259. The Seventh Circuit's decree (printed in Appendix D hereto, *infra* pp. 11a to 18a) and orders (printed in Appendix C hereto, pp. 9a to 10a) denying the Company's petition for rehearing and rehearing en banc are unreported. The decision and order of the Board (C.A. 7-33)[1] are reported at 156 N.L.R.B. No. 123.

JURISDICTION.

The opinion of the Seventh Circuit was handed down December 1, 1966; the Company's timely petition for rehearing and rehearing en banc was denied February 6, 1967; and on February 8, 1967, the Seventh Circuit entered its decree against the Company. The jurisdiction of this Court is invoked under 62 Stat. 928 (1948), 28 U.S.C. Section 1254(1) (1964), and under 61 Stat. 147 (1947) as amended 29 U.S.C. Section 160(f) (1964).

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[1] References to the appendix to the Company's brief to the Seventh Circuit are designated "C.A.".

QUESTIONS PRESENTED.

1. Was there substantial evidence in the record as a whole to justify the Seventh Circuit's affirmation of the Board's findings of fact?

2. May the Board order the reinstatement of employees discharged for cause by balancing alleged employer unfair practices against employee misconduct?

FEDERAL STATUTES INVOLVED.

The primary statutory provisions involved are Sections 8(a)(3) and 10(c) of the Labor Management Relations Act (Taft-Hartley Act) (hereinafter referred to as the "Act"). 61 Stat. 140 (1947), as amended, 29 U.S.C. Section 158(a)(3) (1964); 61 Stat. 147 (1947), 29 U.S.C. Section 160(c) (1964). All pertinent parts of the Act appear in Appendix E hereto, p. 19a.

STATEMENT OF THE CASE.

Basis of Federal Jurisdiction. The jurisdiction of the Seventh Circuit was invoked pursuant to 29 U.S.C. Section 10(f) to review an order of the Board issued pursuant to the Act.

Summary of Facts. During September and October, 1962, four employees were terminated by the Company, and the Trial Examiner found that two of the terminations of employment—those of Walter Heaston and Melvin Moistner—did not violate Section 8(a)(3) of the Act. (C.A. 62-63; 68-69.) He found that Heaston was laid off for economic reasons and that there was insufficient evidence to establish discrimination in Moistner's layoff. The Board overturned the Trial Examiner's findings with respect to Moistner and Heaston, and the Seventh Circuit affirmed the Board. (C.A. 14-15; 18.) The Company also was found to have committed a few inadvertent, highly technical violations of Section 8(a)(1) and one inadvertent, highly technical violation of Section 8(a)(2) during the period prior to November 19, 1962. (C.A. 8; 165.)

On November 19, 1962, a group of the Company's employees returned to their work stations following their noon break and refused to work and refused to leave the plant. The evidence showed and the Trial Examiner found that their only reason for striking was the discharge of a single employee earlier that day. (C.A. 73; 75.) The evidence showed and the Trial Examiner found that 15 of the strikers remained in the plant 4 or more hours

after they quit working;[2] two others were there 3 hours after they quit working;[3] and 10 or more were there from 1 to 2 hours after they quit working.[4]

During this time the strikers shut off machinery (C.A. 144; 154; 200; 218-219; 239.), told non-strikers to leave the plant, (C.A. 117; 144.), refused to work, refused to leave the plant, refused to answer questions (C.A. 75; 235.), and prevented the night shift from coming on as scheduled. (C.A. 230; 246; 257.) Production was brought to a complete halt and remained halted most of the afternoon. (C.A. 184-185; 226-227.) In short, the record shows that the strikers seized the plant for the better part of a day. Those discharged were discharged for engaging in unprotected, unlawful concerted activity and for refusing to leave the plant when requested. (C.A. 19.)

On these facts the Board found, contrary to the Trial Examiner, and the Seventh Circuit affirmed its findings, that the strike was caused by all the Company's alleged unfair practices (C.A. 22-23.), that the strikers loitered in the plant only 1½ to 2 hours (C.A. 23.), that there was no threat of violence (C.A. 23-24.) nor were there acts of defiance by the strikers (C.A. 20.), that operations were somewhat curtailed but not completely shut down (C.A. 24.), and that the strikers were discharged for refusing to work or for standing mute when polled. (C.A. 19.)

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[2] C.A. 100; 106-107; 108-109; 117-118; 119-120; 120; 121; 122-123; 123-124; 128-129; 129-130; 140-141; 150-151; 152-153; 156.

[3] C.A. 79-80; 147-148.

[4] C.A. 82; 84-85; 86; 91; 92-93; 95; 98; 131-132; 149-150; 154-155.

The day following the in-plant strike, November 20, 1962, non-striking employees, who had been instructed by the Company to report for work at 6 a.m. and 7 a.m. (C.A. 231.), were confronted at the entry to the plant parking lot with pickets less than 3 feet apart. (C.A. 159; 139; 137; 106; 209; 220; 253-254; 254-255; 260-264; 264.) Cars were prevented from entering and some employees went home as a result. (C.A. 159; 193; 255-256.) Again contrary to the Trial Examiner, the Board and the Seventh Circuit found that "there was no evidence that any employee desiring to enter was prevented from doing so."

The Board found that the conduct of the strikers was within the protection of the Act; but the Seventh Circuit refused to adopt this finding. Even so, both the Board and the Seventh Circuit applied the so-called *Thayer* doctrine, *NLRB* v. *Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), *cert. denied,* 348 U.S. 883, and balanced the employees' misconduct against the Company's alleged insignificant, inadvertent and highly technical unfair practices to determine whether reinstatement would effectuate the policies of the Act. On the basis of balancing, reinstatement of the discharged strikers was ordered in spite of their misconduct.

REASONS FOR GRANTING THE WRIT.

Question 1

In reviewing decisions of the Board, Courts of Appeal have a duty to determine whether on the record as a whole there is "substantial evidence to support agency findings." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951). This duty was imposed deliberately and with good reason.

> "We conclude, therefore, the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." 340 U.S. at 490.

At the same time, the Supreme Court has stated that it will intervene in cases in which the circuit courts of appeal abdicate this duty. *Universal Camera Corp.,* 340 U.S. at 491.

Yet, the record in the present case shows that many of the Board's findings and inferences are not merely unsupported by the evidence; they are in conflict with it. In addition, the Board's reversal, without support in the record, of the Trial Examiner on many important findings was affirmed, even though the Seventh Circuit has required that such reversals be supported in the record. *Indiana Rayon Corp.* v. *NLRB,* 355 F.2d 535, 540 (7th

Cir. 1966). The Board, with the acquiescence of the Seventh Circuit, has rewritten the facts to support a decision that cannot be supported on the record.

Question 2

In its opinion, the Seventh Circuit endorsed the so-called *Thayer* doctrine under which the Board may balance employee misconduct against employer unfair practices in ordering reinstatement regardless of whether a discharge was for cause. *NLRB* v. *Thayer Co.*, 213 F.2d 748, 753 (1st Cir. 1954), *cert. denied* 348 U.S. 883. The *Thayer* doctrine is a reversion to the law of the jungle in which the union, if it believes that the employer's conduct is "flagrant" or constitutes "massive" unfair labor practices may advise its members that they may engage in misconduct with impunity. This doctrine is a positive inducement to lawlessness in labor disputes. The Seventh Circuit has held that because Golay was guilty of unfair labor practices, its employees could thereafter engage in misconduct (which the Seventh Circuit holds to be *un*protected activity) and that Golay could do absolutely nothing to protect itself against the misconduct of employees.

The United States Supreme Court has never been asked to grant certiorari in a case of this kind. The *Thayer* doctrine has been applied in only two cases. In *Thayer* and in *UAW Local 833* v. *NLRB*, 300 F.2d 699 (D.C. Cir. 1962), *cert. denied* 370 U.S. 911, certiorari was sought and denied; but both of those decisions merely remanded the cases to the Board for application of balancing, so the *Thayer* doctrine was not ripe for consideration by the Supreme Court in either case. Certiorari also was sought for the court decision enforcing the order based on bal-

ancing entered by the Board on remand after the *Local 833* decision. *Kohler Co.* v. *NLRB,* 345 F.2d 748 (D.C. Cir. 1965), *cert. denied* 382 U.S. 836. However, the gist of the main arguments of both the Board and the UAW in opposition to Kohler Co.'s petition for certiorari was that the company's unique unfair practices required a unique remedy. Great emphasis was placed on the company's "unremitting calculated provocations," UAW Brief p. 15, *Kohler Co.* v. *NLRB,* 382 U.S. 836; *Kohler Co.,* 148 N.L.R.B. 1434, 1446 (1965), and twenty year record of open hostility to unions.

Even if balancing of misconduct is proper in a case such as the *Kohler* case (and the Company does not admit that it is), the present case in no way resembles *Kohler.* The Company's unfair practices—if they were such—were three separate discharges (two of which the Trial Examiner found lawful) occurring over a period of months and insignificant, inadvertent, and highly technical violations of Sections 8(a)(1) and 8(a)(2) of the Act. The 8(a)(1) violations were, for the most part, based on incidents of a sort that are inevitable in any large operation undergoing an organizational campaign. There is nothing in the record to suggest that two of the discharges or any of the 8(a)(1) violations or the 8(a)(2) violations had or could have had a provocative effect on the employees. To say that the Company's unfair practices justify application of the *Thayer* doctrine is to make a drastic and unsound doctrine virtually limitless in its application, both actual and potential.

Regardless of the specific facts involved, the so-called doctrine presents an important question of federal law which has not been, but should be settled by the United

States Supreme Court. Consideration of the doctrine is imperative because it is in direct and irreconcilable conflict with the Act itself. Section 10(c) of the Act provides:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. §160(c) (1964).

Legislative history makes it crystal clear that Congress intended that interference with production of the sort engaged in by the strikers in the present case be considered "cause" within the meaning of Section 10(c):

> "C. A third change forbids the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause. * * * Matter of *Wyman-Gordon Company,* 62 N.L.R.B. 561 (1945), is typical of the Board's attitude in such cases. In that case, the employer discharged an active union member for interrupting other employees at their work on materials for war. The Board reinstated the man with back pay. The Company appealed. In court, the Board argued that the employee's conduct did not 'seriously interfere with output for war, or cause undue spoiling of materials', and that the employee was not 'enormously delinquent.' Declaring that *any* interference, slight or moderate justified discharge, the court said (17 L.L.R. 823) [153 F.2d 480 (7th Cir. 1946)]:
>
> > 'If it were not before us in print, we would find it difficult to believe that any responsible person or agency would resort to such asinine reasoning.'
>
> *The change made in Section 10(e) [sic] on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants,*

> *refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct.* * * * The Board may not 'infer' an improper motive when the evidence shows cause for discipline or discharge." H.R. Rep. No. 245, 80th Cong. 1st Sess. 42-3 (1947) (emphasis added.).

Yet, according to the so-called *Thayer* doctrine, the Board can order reinstatement of employees discharged for cause if it finds that the employer's unfair practices outweigh the misconduct of the discharged employees. The "reasoning" behind the doctrine seems to be that "cause" itself is determined by balancing; or in other words, cause for discharging an employee depends on what the employer, not the employee, does. Such semantic gymnastics are indeed bizarre, and it is not surprising that the "reasoning" is without any support whatever in the legislative history of Section 10(c).

In short, the courts which created and applied the *Thayer* doctrine, right or wrong, rewrote Section 10(c) to have a meaning contradictory both to its express language and to the stated intent of Congress. Understandably, the courts and tribunals which have attempted to apply the doctrine have been in frequent and material disagreement as to exactly what the law surrounding Section 10(c) and the Thayer doctrine is.[5] A situation in

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[5] It seems significant that both the Board and the courts which have attempted to follow *Thayer* have disagreed as to the meaning and application of it. See *Kohler Co.* v. *NLRB*, 345 F.2d at 749 (dissent by Miller, J.); *UAW Local 833* v. *NLRB*, 300 F.2d at 707 (dissenting opinion of Miller, C.J.); *Kohler Co.*, 148 N.L.R.B. at 1457 (dissenting opinion of Member Leedom); *H. N. Thayer Co.*, 115 N.L.R.B. 1591, 1595 (1956).

which the inferior federal courts have, by outright judicial legislation, created such controversy and confusion seems to cry out for Supreme Court consideration, if for no other purpose than to clear the air.

The so-called *Thayer* doctrine also conflicts squarely with the opinion of the United States Supreme Court in *NLRB* v. *Fansteel Metallurgical Co.*, 306 U.S. 240 (1939). That case involved the discharge of sitdown strikers, and the Court rejected the same balancing argument made in the present case:

> "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." 306 U.S. at 253.

Several circuit courts have applied the *Fansteel* rule to strikers who engaged in misconduct short of actual violence even though the employer was found guilty of unfair labor practices which occurred prior to the misconduct. See *e.g.*, *NLRB* v. *Clearfield Cheese Co.*, 213 F.2d 70 (3d Cir. 1954); *NLRB* v. *Longview Furniture Co.*, 206 F.2d 274 (4th Cir. 1953); *W. T. Rawleigh Co.* v. *NLRB*, 190 F.2d 832 (7th Cir. 1951).

The application of the so-called *Thayer* doctrine in the present case also is squarely in conflict with the opinion of the United States Court of Appeals for the Second Circuit in *NLRB* v. *Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958). In that case, employees struck shortly after the discharge of a supervisor, and the employer, which thought the strike was to compel reinstatement of the supervisor, discharged the employees for engaging in

unprotected activity. The Board held the strike was for other, lawful purposes and ordered reinstatement. The Court found the activity to be unprotected and denied reinstatement. It held (citing *Thayer*):

> "If it was not a protected activity, then it is axiomatic that the employer, regardless of its motivation, may discharge the strikers and the Board is powerless to order reinstatement." 258 F.2d at 464.

In the present case the Seventh Circuit refused to adopt the Board's finding that the strikers' activity was protected (p. 4a), yet it ordered reinstatement of the strikers who were discharged for participation in the unprotected activity. The conflict with *Ford Radio* seems irreconcilable. See also *NLRB* v. *Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965), where the court refused to enforce a Board reinstatement order based on *Thayer*.

Finally, there has been general comment pointedly critical both of the so-called *Thayer* doctrine, Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 Va. L. Rev. 1322, 1324-25 (1959), and of the *Thayer* doctrine as applied in the *Kohler* case. Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 V. Pa. L. Rev. 459, 474-76 (1966).

SUMMARY.

If the court's decision in this case is permitted to stand, the Seventh Circuit will have been permitted to abdicate a duty assigned it by the United States Supreme Court; a new and violence-charged weapon, heretofore unlawful in each and every sense of the word, will have been added to the ever-growing union arsenal; the courts and the Board will have been permitted to rewrite a clear and unambiguous statute in a way that conflicts with specific Congressional purpose as well as the express policy of the Act; and an exception will have been written into the premise implied by the Court in *Adderly* v. *Florida*, 385 U.S. 39 (1966):

> "The State, *no less than a private owner of property*, has power to preserve the property under its control for the use to which it is unlawfully dedicated." 385 U.S. at 47. (Emphasis added.)

CONCLUSION.

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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